Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08540/2018**
HU/08550/2018
HU/08554/2018

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On April 3, 2019	**On April 23, 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR SATWINDER SINGH
MRS RAJWINDER KAUR
MR RAMANDEEP SINGH
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Sawar, Counsel (Direct Access)
For the Respondent: Mr Howells, Senior Home Office Presenting Officer
Interpreter: Mr Cheema

DECISION AND REASONS

1. The first and second-named appellants are husband, wife and the third-named appellant is their child (born 8/11/1996). They are all nationals of India.

2. In 2002, the first-named appellant entered the United Kingdom illegally. The second and third-named appellants were granted entry clearance as visitors to the United Kingdom on June 4, 2009. At the date of entry, the third named appellant was aged 12 years 5 months of age.

3. On February 5, 2013 the appellants applied for leave to remain in the United Kingdom, but this was refused without a right of appeal. A further application was lodged on March 24, 2014 which was refused without a right of appeal but following a consent order in the Administrative Court in October 2015 (and a further threat of legal proceedings) the respondent reconsidered their applications but refused their applications on March 24, 2018.

4. The appellants appealed these decisions under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on April 6, 2018.

5. Their appeals came before Judge of the First-tier Tribunal Hawden-Beal on September 12, 2018 and in a decision promulgated on September 25, 2018, the Judge dismissed their appeals on human rights grounds.

6. The appellants appealed this decision, out of time, on October 17, 2018 arguing the Judge had materially erred by blaming the child for his parents' poor immigration histories and misdirecting herself in law.

7. In granting permission to appeal (and extending time) on October 29, 2018, Judge of the First-tier Tribunal Gibb found it arguable the Judge had materially erred in her approach.

8. In a Rule 24 response dated November 27, 2018, the respondent opposed the application arguing the main ground of appeal was flawed because at the date of hearing the third-named appellant was no longer a child and the Judge had considered the third-named appellant's appeal on its own merits and had reached findings open to her.

9. No anonymity direction is made.

SUBMISSIONS

10. Mr Sawar adopted the grounds of appeal and submitted there were two material errors in law. The first error was that the Judge blamed the third-named appellant for accessing education. At paragraph 5, the Judge on three occasions blamed or criticised the third-named appellant for accessing education. The appellant came into this country when he was under the age of 13 and there was no evidence it was his decision to remain here and be educated and the Supreme Court made it clear in Zoumbas v SSHD [2013] UKSC 74 that he should not be blamed for a decision taken by his parents. The Rule 24 response suggested this ground was flawed because at the date of hearing the third-named appellant was an adult but when the child accessed free education, he was a child.

11. The Judge also failed to follow the guidance in PD and others (Article 8-conjoined family claims) Sri Lanka [2016] UKUT 00108. Mr Sawar had argued before the FTT that the Judge should consider the third-named appellant's appeal separately (as an adult) but the Judge failed to consider his circumstances distinctly or why it would be unjustifiably harsh for him to return.

12. The second error concerned the way the Judge approached paragraph 320(7B) HC 395. He had found the third-named was technically not an overstayer and could apply to return to the United Kingdom to continue his studies at a university in this country. This approach was incorrect because Section 3C leave could not apply in this case because the appellant was an overstayer once his leave expired and Section 3C leave could not keep his presence in this country legal.

13. Mr Howells adopted the Rule 24 response and submitted the Judge had not blamed the third-named appellant but had simply observed the third-named appellant had benefited (see paragraphs 35, 38 and 41 of the decision). However, even if the Judge did blame the third-named appellant he then applied the test set out in Razgar [2004] UKHL 00027 and found it was proportionate to return all the appellants for stated reasons and not simply because of a recourse to public funds. Specifically, with regard to the third-named appellant he submitted that at paragraphs 35-36 the Judge did consider his position and simply posed a number of rhetorical questions.

14. Concerning the second ground, Mr Howells submitted the third-named appellant came here legally but overstayed and whilst the Judge may have erred when applying paragraph 320(7B) HC 395 he argued the Judge went onto consider the option of whether it was reasonable for him to return to India and there was no material error.

15. In response, Mr Sawar maintained the Judge did blame the third-named appellant and failed to consider the third-named appellant's own claim and simply posed rhetorical questions in paragraphs 35-36 of the decision and failed to carry out a proper analysis of his claim. The third-named appellant had been in the United Kingdom and whilst he may have overstayed it had not been his decision and he had continued to remain here as an adult because he had an appeal pending.

16. There was a difference when considering the public interest of the third-named appellant to that of his parents and the Judge should have made findings on the public interest in his removal. It was open to the Tribunal to find an error on the third-named appellant's decision but to dismiss the claims of his parents.

FINDINGS

17. In dismissing the three appeals of the appellants the Judge concluded the public interest in maintaining immigration control justified the removal of

each of these appellants. Mr Sawar submitted that the Judge had made two crucial errors which amounted to an error in law particularly insofar as the third-named appellant was concerned.

18. The first-named appellant had entered the country illegally in 2002 and by the time his appeal came to be heard by the First-tier Tribunal he had been residing in this country for around 16 years. The second-named appellant had entered the country legally as a visitor in June 2009 but thereafter overstayed and by the time her appeal was heard by the First-tier Tribunal she had been residing in this country for around nine years.

19. The First-tier Tribunal Judge concluded there were no very significant obstacles to their integration into India noting that they had spent over 30 years living in India before they arrived in the United Kingdom and they were both able to understand how life went on in India and would be able to participate in such a life. The Judge did not find any exceptional circumstances which would result in unjustifiably harsh consequences for the First or Second-named appellants. The Judge rejected their claim they were not on speaking terms with family members in India and subsequently, when considering proportionality, applied both sections 117B(4) and (5) of the 2002 Act which made it clear that little weight should be placed on a private life established when a person's immigration status was either unlawful or precarious.

20. The grounds of appeal, advanced by Mr Sawar, did not seek to challenge the Judge's decision to refuse the First or Second-named appellants' claims. In fact, Mr Sawar went as far to suggest that this was a situation where the third-named appellant's position could be treated differently to those of his parents.

21. The outcome of the third-named appellant's appeal would not, on its own, be sufficient to enable the remaining appellants to succeed because at the date of hearing he was an adult and was no longer a dependent child of his parents.

22. Turning to the third-named appellant's appeal, Mr Sawar argued that the Judge had not considered his claim independently and he had been blamed for the actions of his parents.

23. The Judge noted at paragraph 22 Mr Sawar's request that the third-named appellant's appeal could be treated separately to that of his parents, but it is submitted that although aware of this submission the Judge failed to consider this for the third-named appellant.

24. The Judge correctly concluded that at the date of application the third-named appellant (and the remaining appellants) could not satisfy the Immigration Rules and in particular he found that as the application had been made in March 2014 the third-named appellant had not been resident in the United Kingdom for seven years and could not therefore

satisfy paragraph 276ADE(1)(iv) HC 395. He could also not satisfy the eligibility requirements of Appendix FM of the Immigration Rules.

25. The Judge went on to consider the appeal outside of the Immigration Rules and reminded himself that in assessing proportionality he would have to have regard to sections 117A-D of the 2002 Act.

26. Mr Sawar argued that the Judge had not considered the third-named appellant's claim separately but a reading of the Judge's decision reveals that is not the case.

27. At paragraph 35 of the Judge's decision, the Judge acknowledged that the third-named appellant had integrated very well into the United Kingdom and had demonstrated outstanding achievements. Mr Sawar had submitted that the reference in paragraph 35 to him achieving free education was effectively blaming him for his parent's choice. The Judge's observation in paragraph 35 was not the Judge blaming the third-named appellant but simply stating the obvious. He wished to remain in this country to continue his education, but the Judge accepted the submission advanced at the hearing that he had no entitlement to continue his education here and had taken no steps into enquiring whether he could be issued a visa to study in the United Kingdom.

28. The third-named appellant told the Judge that he wished to set up a business before continuing his education and in considering proportionality the Judge was obliged not only to consider that as an option but also the option of him doing exactly the same in India. The Judge at paragraph 36 considered the length of time he had resided here compared to the time he had resided in India. The Judge made it clear in paragraph 42 that the third-named appellant "is not to be blamed for the conduct of his parents".

29. The argument advanced by Mr Sawar that the appellant was blamed for the actions of his parents overlooked the fact that the Judge considered the third-named appellant's circumstances and did not reject his claim on the basis of his parent's conduct.

30. The second argument that was advanced concerned the Judge's approach to paragraph 320(7B) HC 395. There was some discussion during the hearing over this issue.

31. The third-named appellant came here legally but that leave expired shortly after his arrival. When he submitted the current application to remain on March 24, 2014 he was under the age of 18 but he would have been an overstayer. My initial view, expressed at the hearing, was that section 3C leave could not apply to this appellant and I do not depart from that view.

32. The Judge concluded that at the time of his most recent breach of overstaying he was under the age of 18 and having considered Mr Sawar's argument (contained in the skeleton argument previously submitted) and

the Judge's reasoning I can see why the Judge made such a finding. This was never a Section 3C issue because the appellant could not extend any leave because he did not have it to extend.

33. However, whichever way the legislation is viewed it is important to look at the Judge's approach to proportionality because it is here that the Judge had to assess whether it would be disproportionate to require the third-named appellant to leave.

34. The Judge clearly had regard to the educational opportunities available to the appellant and in assessing proportionality he took into account Sections 117A-D of the 2002 Act.

35. Paragraph 320(7B) HC 395, if applied to the third-named appellant, does not mean this appellant would be prevented from continuing his studies in the United Kingdom for an indefinite period. If he voluntarily left the United Kingdom, at his own expense, he would be entitled to seek re-entry within a maximum period of two years. It is only where the UK authorities funded his removal that the period increased to a minimum of five years and a maximum of 10 years. The Judge placed weight on the fact that he had established his private life whilst his immigration status was precarious albeit the Judge specifically noted in paragraph 42 that he could not be blamed for the conduct of his parents.

36. Even if the Judge had erred in his approach to paragraph 320(7B) HC 395, which I do not find, I am satisfied that in assessing the appellant's case he did have regard to not only the negatives but also the positive aspects of his case and reached a conclusion that it would not be disproportionate to require him to leave at the same time as his parents.

37. I reject Mr Sawar's submission that the Judge did not consider individual aspects of the third-named appellant's appeal or that any erroneous approach to paragraph 320(7B) HC 395 materially affected the outcome under article 8 ECHR.

DECISION

38. I find there was no error of law and I uphold the original decision.

Signed Date 09/04/2019

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I do not make a fee award because I have dismissed the appeal.

Signed Date 09/04/2019

Deputy Upper Tribunal Judge Alis